No. 85-247 (4)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LAWRENCE CRANBERG,

Petitioner,

—against—

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent,

and

LAWRENCE CRANBERG,

Petitioner,

—against—

ASSOCIATED PRESS and
AUSTIN AMERICAN STATESMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF ASSOCIATED PRESS IN OPPOSITION TO PETITION

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PRELIMINARY STATEMENT

Petitioner vigorously litigated his libel claim against respondent Associated Press[1] through nearly a year-and-a-half of

1 Respondent Associated Press, a news cooperative, has no parent companies, non-wholly owned subsidiaries or affiliates which are required to be named in a listing pursuant to U.S. Sup. Ct. Rule 28.1.

discovery and a bench trial. At the trial's end, the statements at issue in the pertinent dispatch were found to be true based on the trial judge's determinations of the credibility of witnesses giving conflicting testimony. Upon its review of the record, the Court of Appeals affirmed this finding and concluded, based on Texas state law, that such truth constituted an absolute defense. Further, the Court found petitioner's procedural objections to be unsupported, given the great latitude provided petitioner in presenting his case. Plainly, this case raises no significant issues, and the decisions below have no broad ranging effect. Simply put, no "special and important reasons for granting a writ of certiorari" are present. Sup. Ct. Rule 17.

COUNTERSTATEMENT OF QUESTION PRESENTED

Was the judgment in this libel suit in favor of Associated Press ("AP") proper where (1) there was substantial testimony at trial supporting the truth of the statements in the pertinent article, and (2) petitioner had sufficient opportunity to introduce at trial all of the oral and written evidence he desired?

COUNTERSTATEMENT OF THE CASE

Petitioner is the creator and promoter of a specialized fire grate which produced what he characterizes as the "slot fire." Following an article in the January 1981 issue of *Consumer Reports* critical of his "slot-fire," petitioner began an extensive campaign to interest the media in his dispute against the publisher, Consumers Union ("CU"), and to publicly discredit the article and CU's testing methods. This campaign culminated in a presentation by petitioner of a paper at the April 1981 meeting in Baltimore of the American Physical Society. In his paper, entitled "Encounter With Consumers Union," Petitioner attempted to expose the inadequacy of CU's report on his fire grate and the testing methods underlying the report. A representative of CU, David Berliner, also attended the meeting to make a rebuttal presentation.

The Associated Press sent one of its Baltimore reporters, Chris Sullivan, to cover the meeting. At the meeting, but prior to the formal presentations, he personally observed a heated argument between petitioner and Berliner which ended in a struggle over a tape recorder allegedly belonging to CU.

Based upon his observation of both the informal debate prior to the presentations and the formal presentations by Messrs. Cranberg and Berliner, the text of the statements submitted, and his interviews with petitioner and Berliner, Sullivan wrote an eighteen-sentence account of the event. A copy of this article is attached hereto as an Appendix. The article summarized both sides of the debate, as well as the confrontation between the two men and the struggle over the tape recorder. It also stated that petitioner had demanded damages from CU, and reported that petitioner had failed to provide CU, upon CU's request, with a list of the alleged errors in CU's article.

On or about April 16, 1982, petitioner brought a libel action against, *inter alia*, AP. Following substantial discovery, the case was tried on September 13 and 14, 1983 before U.S. District Judge Fred Shannon. At trial Messrs. Sullivan and Berliner described in detail the struggle over the tape recorder; petitioner conceded that he had not delivered a list of the alleged errors in CU's article to CU; and letters introduced, as well as oral testimony, attested to petitioner's demand for damages from CU.

At the close of the bench trial, the judge found in favor of AP and rendered his decision. In particular, Judge Shannon concluded, *inter alia*, that he believed the testimony of Mr. Sullivan regarding the tape recorder incident and that AP's story was a "fair and accurate rendition" of what happened at the APS meeting. Petit. at 33, 39. Following trial, petitioner was permitted to supplement the record in massive proportions. His submissions, however, did not persuade the judge to alter his ruling.

On appeal, the Fifth Circuit affirmed the trial court's ruling on two independent grounds. First, based on its review of the record, the Court found no basis for disturbing the "credibility choice" made below and found "*ample support*" for the conclusion that the article's rendition of the events was "fair and accurate." Petit. at 58 (emphasis in original). Second, the Court affirmed the finding that, under Texas law, the articles were true or substantially true and thus not actionable. *Id.* at 58-59. The Court also rejected procedural attacks on the judgment which are virtually identical to those which petitioner makes before this Court. *Id.* at 63-66.

REASONS FOR DENYING CERTIORARI

I.

ISSUES CONCERNING THE FIRST AMENDMENT PROTECTION OF SPEECH RELATING TO PUBLIC FIGURES ARE IRRELEVANT TO THE DECISION BELOW

Petitioner attempts to convince this Court to use this case to re-examine the "public figure" principles established in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Yet, as petitioner concedes (Petit. at 23), the Fifth Circuit expressly found it "unnecessary to reach the issues of whether Cranberg was a public figure or whether actual malice existed." Petit. at 59. That court based its ruling on the truthfulness of AP's article which, under Texas libel law, is an absolute defense. *Id.* at 58-59. Simply put, no Federal Constitutional issue is raised here. Petitioner's tortured attempt to manufacture an issue by returning to the trial court's unpublished ruling should be rejected.

II.

PETITIONER'S DUE PROCESS RIGHTS WERE ADEQUATELY PROTECTED IN THE PROCEEDINGS BELOW

Petitioner's procedural arguments are similarly meritless.

First, petitioner argues that he was denied deposition discovery of certain AP officers and that such denial violated this Court's ruling in *Herbert* v. *Lando*, 441 U.S. 153 (1979). Yet, the officers whom petitioner sought to depose (including AP's president and general manager), had nothing to do with the investigation, writing or editing of the article. Chris Sullivan, who was deposed extensively and who testified at trial, was the only AP employee who researched, wrote and edited the story.[2] Thus, petitioner had full opportunity to inquire into the state of mind and editorial process of the author of the article. This Court's ruling in *Herbert* v. *Lando*, 441 U.S. 153 (1979), requires no more.

In *Herbert* v. *Lando*, the Court stated:

> [T]he requirement of Rule 26(b)(1) that the material sought in discovery be "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." Rule 26(c). . . . judges should not hesitate to exercise appropriate control over the discovery process.

441 U.S. at 177. Here, the facts relating to the relevance of the proposed depositions sought by petitioner and his need therefor were fully briefed and argued before the judge on AP's motion for a protective order. Given the total lack of contact between the AP officers and the article, the trial judge properly

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2 Minor editorial changes which did not alter the substance of the story were made by AP's Baltimore office before the dispatch was sent out on the AP wire.

exercised his discretion and control over discovery in refusing to permit petitioner to subject these officers to needless depositions. Petitioner's objection to such ruling is baseless.

Second, petitioner's lengthy attack (Petit. at 21-23, 26-30) on the trial court's handling of the trial is also misguided. Petitioner, who had proper notice of the time of the trial, was granted full opportunity to present his witnesses, cross-examine the defendants' witnesses and testify himself (which he did twice). He also conducted substantial pre-trial discovery and was permitted to make post-trial submissions to supplement the record. Due process requires no more. Further, as the court below found (*id.* at 65-66), the active participation of the judge was fully consonant with the non-jury status of the trial and there is no evidence that petitioner was prejudiced by such participation. Petitioner's unsupported intimations to the contrary should be rejected.

Finally, petitioner's suggestion that Judge Shannon failed to qualify as an Article III federal judge is frivolous. During the pendency of this action, Judge Shannon properly served as an Article III district court judge as he had been duly appointed and possessed life tenure. The post-trial announcement of his planned retirement from the bench had no bearing on his constitutional qualifications or ability to complete his duties vis-a-vis this case. Indeed, the court below found no evidence of any "prejudice or favoritism" toward defendants and petitioner can show none. Petit. at 64.

In sum, petitioner was provided every opportunity to submit whatever evidence he desired, and to raise all issues, before the trial court. There is no evidence that the procedures prejudiced petitioner. The Fifth Circuit was clearly correct in concluding that its "review of the entire record establishes that Cranberg lost a fairly tried case on an honest resolution of contested fact." Petit. at 64.

CONCLUSION

For the reasons set forth above and in the decisions below, the Petition of Writ of Certiorari should be denied.

Dated: September 10, 1985

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Controversial Fire Grate Heats Up Gathering of Physicists,
By CHRISTOPHER SULLIVAN, AP

BALTIMORE (AP)—The inventor of a patented way to build a "better" fireplace fire told a national forum of scientists Thursday that he had been burned by a report on his grate that appeared in a leading consumer publication.

Lawrence Cranberg told members of the American Physical Society that a January article in Consumer Reports unfairly faulted his invention, and he asked the society to investigate the magazine's research techniques.

Assistant director David C. Berliner of The CU, which publishes Consumer Reports, called Cranberg's claim a "distortion."

As scientists quietly debated topics of more esoteric interest, Cranberg and Berliner vigorously argued during a presentation session and beforehand. At one point they physically struggled over a tape recorder placed by Consumer Reports on a table after Cranberg protested it had been "surreptitiously planted" there. "That will give you an idea of how things can be distorted by Dr. Cranberg," Berliner said. He noted that the recorder had been in plain view and was turned off.

Cranberg said the Consumer Reports article contained more than 20 "distortions, falsifications and suppressions of evidence . . ." in giving a reader an extremely unfavorable assessment of his invention, marketed by Cranberg's Texas Fireframe Co. of Austin.

He said a grateless arrangement of logs, which the magazine claimed was more efficient for heating, "won't work."

In rebuttal, Berliner said Consumer Reports—which reports monthly on product tests it performs and has a circulation of 2.9 million—has established a procedure for responding to complaints of unhappy manufacturers, which he said Cranberg had not followed.

Berliner said the magazine asks for a specific listing of errors in its stories, and Cranberg conceded he has not supplied it. He said he got no satisfaction when he tried to discuss his claims with the magazine's lawyer.

Berliner said that in a letter to CU after the article was published Cranberg "demanded payment of $1,000 a day in damages and a complete retraction" as compensation for damage already done to his business by the article.

"Even before we could respond to his claims," Berliner told the physicists group, "Dr. Cranberg warned us that if we failed to meet his demands, he would give a speech attacking us at this prestigious gathering."

Cranberg said his report to the group was only the latest of several he has made updating progress on his 1975 invention.

Claiming his fire grate has been found efficient by others who have tested it, Cranberg said it uses a 19th century heat-radiation theory and separates an upper row of logs from a bottom row. His grate and his instructions for using it are patented and copyrighted, Cranberg said.

There was no immediate response from the officials of the American Physical Society to his request that they formally investigate the CU.